



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Signed November 5, 2001

OSWER 9360.0-42

MEMORANDUM

SUBJECT: Amendment to the Action Memorandum Guidance and Removal Cost Management System to Address Calculation of Removal Action Project Ceilings

FROM: Elaine F. Davies, Acting Director *s/ Elaine F. Davies*
Office of Emergency and Remedial Response

TO: Superfund National Policy Managers
Regions 1 - 10

Purpose

The purpose of this document is to provide guidance on estimating and documenting in an action memorandum the cost of a removal action relative to the limitation on obligations from the Fund in Section 104(c)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Specifically, this memorandum (1) clarifies the meaning of the term "obligations" in Section 104(c)(1) and the application of the term to an action memorandum; (2) explains how to calculate and document in an action memorandum the obligations subject to the Section 104(c)(1) limit; and (3) explains how to calculate and document in an action memorandum the estimated total removal action costs that may be subject to cost recovery, based on information available at the time of the action memorandum. This directive amends Sections VB, VIII, IX and the Enforcement Addendum in the Superfund Removal Procedures, Action Memorandum Guidance, OSWER Directive 9360.3-01 and the cost projection portion of the Removal Cost Management System (RCMS), OSWER Directive 9360.02B. This document is effective upon signature.

Background

An action memorandum documents the decision to initiate a removal action. It identifies a proposed action and substantiates the need for a removal action based upon the criteria in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300. It is also used to document approval of the funding necessary to implement the removal action.

Until now, the Action Memorandum Guidance and the RCMS provided removal program guidance on estimating and documenting removal action project ceilings in action memoranda. These estimates included extramural costs, a contingency based on extramural

costs, and intramural direct and indirect costs. Regions calculated indirect costs as the product of EPA's predicted labor hours to which per-hour indirect costs would be allocated using an indirect cost rate (expressed as dollars per hour). These rates varied from region to region.

On October 2, 2000, a memorandum from the Acting Director of the Financial Management Division (FMD) transmitted Superfund indirect cost rates calculated under a revised methodology in accordance with Office of the Comptroller's Policy Announcement 00-05 (OCA 00-05).¹ The revised methodology applies an indirect cost rate (expressed as a percentage), which varies from region to region, to all site-specific costs (intramural **plus** extramural). This results in an estimate of the total costs of the removal action that reflects the project's full costs, consistent with Statement of Federal Financial Accounting Standards No. 4. Neither OCA 00-05 nor the FMD memorandum addressed the use of the new indirect cost methodology in the development of removal action project ceiling estimates. Therefore, regions have continued to include both intramural and extramural costs in calculating removal action project ceilings, following the approach contained in the Action Memorandum Guidance and the cost projection portion of the RCMS.

Implementation

Revised Formula for Calculating Removal Ceilings under Section 104(c)(1)

This memorandum outlines a new approach for calculating removal action project ceilings. EPA, in amending the removal action project ceiling calculation to incorporate the new indirect cost methodology, determined that other changes to the calculation were also necessary. For fund-financed removal actions, Section 104(c)(1) states that "...obligations from the Fund, other than those authorized by subsection (b) of this section, shall not continue after \$2 million has been obligated for response actions or 12 months have elapsed from the date of initial response to a release or threatened release of hazardous substances." [42 U.S.C. § 9604(c)]. CERCLA provides waivers from these limits: (1) if the situation is an emergency [42 U.S.C. § 9604(c)(1)(A)] or, (2) if the action is consistent with the remedial action to be taken [42 U.S.C. § 9604(c)(1)(C)]. *EPA is adopting a new approach under which it will track and count only direct extramural costs against the CERCLA Section 104(c)(1) cost limit (or ceiling).* EPA believes this approach is consistent with the statutory language which references amounts "obligated for response actions" and interprets the statutory provision to mean only those costs incurred by EPA that are obligated for the cleanup of a site. Intramural direct costs and indirect costs, on the other hand, are not obligated in the same manner, but rather are obligated initially for non-site-specific purposes. Later, intramural direct costs are then redistributed to sites as they are incurred for site-specific response actions, while indirect costs are later allocated to sites in accordance with EPA's indirect cost accounting methodology. The revised approach to the removal action project ceiling calculation, set forth below, conforms more precisely with the statutory term

¹ See "Accounting for Indirect Costs Associated with Superfund Site-Specific Activities," Comptroller Policy Announcement No. 00-05, OCA (May 26, 2000).

“obligations” by including in the amounts subject to the removal action project ceiling only amounts obligated for direct site-specific extramural costs of a removal action.

The attachment provides instructions for developing and documenting the obligations limitation, expressed as a removal action project ceiling, under the new approach. As soon as regions determine that the estimated removal action project ceiling may exceed \$2M, they must process a Statutory Exemption Request Action Memorandum (see Action Memorandum Guidance, p. 26).

The new approach counts only direct extramural costs against the obligations limitation. The calculation of the obligations limitation (or removal action project ceiling) does not include estimates of other costs -- such as intramural direct labor, travel, and indirect costs, and subsequent enforcement costs -- that are recoverable under Section 107 of CERCLA. To avoid any risk that potentially responsible parties (PRPs) may misunderstand the difference between the costs included in a removal action project ceiling request and the total costs to be incurred for a removal action, Regions should also calculate total estimated costs for the response action and include it as a single figure in the enforcement section of the action memorandum. Regions should follow the instructions in the attachment to calculate and document these estimates.² Contact Regional Financial Management personnel or access EPA’s internal website at: <http://intranet.epa.gov/ocfo/policies/transmittals/tr01.htm> to obtain the appropriate Region-specific indirect cost rate.

Please call Schatzi Fitz-James (OERR) at (703) 603-8887 or Bruce R. Kulpan (OSRE) at (202) 564-4252 if you have any questions.

Disclaimer

This memorandum and attachment are intended solely for the guidance of employees of EPA. It is not a regulation, and does not create legal requirements. EPA will follow the guidance to the extent appropriate for individual removal actions, depending on the facts of each case.

Attachment: Action Memorandum Outline

cc: Jeff Josephson, Lead Region Coordinator
OERR Records Manager
OERR Document Coordinator
Kenneth Patterson, OSRE, Acting Division Director

² Advance notice of the total estimated costs of a response action is not required by statute or regulation. Regions should prepare this estimate as a matter of good practice, however, this memorandum is not intended to create any rights for responsible parties, and neither the lack of a total cost estimate nor deviation of actual total costs from this estimate will affect the United States’ right to cost recovery.

Attachment
Action Memorandum Outline

- I. Purpose
- II. Site Conditions
 - A. Site Description
 - B. Other Actions to Date
 - C. State and Local Authorities' Role
- III. Threats to Public Health or Welfare or the Environment, and Statutory and Regulatory Authorities
- IV. Endangerment Determination
- V. Proposed Actions and Estimated Costs
 - A. Proposed Actions
 - B. Estimated Costs

Sample Calculation of Removal Action Project Ceiling Estimate

Extramural Costs:

Regional Removal Allowance Costs:

| | |
|--|------------|
| Total Cleanup Contractor Costs | \$ 745,000 |
| (This cost category includes estimates for: ERRS, subcontractors, Notices to Proceed, and Interagency Agreements with Other Federal Agencies. Include a 10-20% contingency.) | |

Other Extramural Costs Not Funded from the Regional Allowance:

| | |
|---|--------------|
| Total START, including multiplier costs | \$ 150,000 |
| Total CLP | + \$ 100,000 |
| Subtotal | \$ 250,000 |

| | |
|----------------------------|------------|
| Subtotal, Extramural Costs | \$ 995,000 |
|----------------------------|------------|

| | |
|--|--------------|
| Extramural Costs Contingency (20% of Subtotal, Extramural Costs; round to nearest thousand) | + \$ 199,000 |
|--|--------------|

| | |
|---------------------------------------|-------------|
| TOTAL, REMOVAL ACTION PROJECT CEILING | \$1,194,000 |
|---------------------------------------|-------------|

- VI. Expected Change in the Situation Should Action Be Delayed or Not Taken
- VII. Outstanding Policy Issues
- VIII. Enforcement
 - Provide a summary statement indicating the extent to which PRPs are known, and whether they can and will perform the proposed response promptly and properly.

- This section of the Action Memorandum should provide EPA's total estimated project-related costs of the removal action. These costs, which are based on full-cost accounting practices, will be eligible for cost recovery and are calculated as follows:

$$\begin{array}{rcl} \text{(Direct Costs)} & + & \text{(Indirect Costs)} & = & \text{Estimated EPA Costs for a} \\ \text{(Direct extramural + Direct intramural)} & + & [\text{(Region-specific Indirect Cost Rate)} & & \text{Removal Action} \\ & & \times \text{(Direct Costs)} & & \end{array}$$

E.g., using the sample extramural cost calculation from the proceeding page (\$1,194,000), an estimate of EPA's direct intramural costs (\$40,000), and 27.02% as the regional indirect cost rate, the total estimated EPA costs for the removal would be:

$$(\$1,194,000 + \$40,000) + (27.02\% \times \$1,234,000) = \$1,567,426.80$$

- Include the following sentences in the enforcement section of the Action Memorandum: *The total EPA costs for this removal action based on full-cost accounting practices that will be eligible for cost recovery are estimated to be \$1,567,427. Include the following language as a footnote in this section: Direct Costs include direct extramural costs and direct intramural costs. Indirect costs are calculated based on an estimated indirect cost rate expressed as a percentage of site-specific direct costs, consistent with the full cost accounting methodology effective October 2, 2000. These estimates do not include pre-judgment interest, do not take into account other enforcement costs, including Department of Justice costs, and may be adjusted during the course of a removal action. The estimates are for illustrative purposes only and their use is not intended to create any rights for responsible parties. Neither the lack of a total cost estimate nor deviation of actual total costs from this estimate will affect the United States' right to cost recovery.*
- Place all remaining information concerning the enforcement strategy in a separate addendum labeled "enforcement sensitive." The enforcement addendum is not part of the Action Memorandum for purposes of NCP and is *not* placed in the administrative record file.

IX. Recommendation

- The following statement must appear in all Action Memoranda to document that the proposed response is in compliance with statutory and regulatory removal provisions: *"This decision document represents the selected removal action for the (Site name), in (location), developed in accordance with CERCLA as amended, and not inconsistent with the NCP. This decision is based on the administrative record for the site."*

- Use the following example approval statement indicating that NCP removal requirements have been substantiated and stating the total removal action project ceiling and the Regional removal allowance costs. Example: *“Conditions at the site meet the NCP section 300.415(b) criteria for a removal and I recommend your approval of the proposed removal action. The total removal action project ceiling if approved will be \$1,194,000. Of this, an estimated \$745,000 comes from the Regional removal allowance.”*